IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

THURSDAY, THE 26TH OCTOBER 2006 / 4TH KARTHIKA 1928

OP.No. 7742 of 1998(V)

PETITIONER:

MANGANAM SERVICE CO-OP. BANK LTD. NO. 1920, MANGANAM, KOTTAYAM, REPRESENTED BY ITS SECRETARY.

BY ADV. SRI.P.RAMAKRISHNAN

RESPONDENTS:
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1. DEPUTY LABOUR COMMISSIONER AND APPELLATE AUTHORITY UNDER THE SHOPS ACT, KOTTAYAM.

2. M.N. SUKUMARAN NAIR, PRIYA BHAVAN, POOTHAKUZHY, SOUTH PAMPADY, KOTTAYAM DIST.

R1 BY GOVERNMENT PLEADER SRI. SHYSON P. MANGUZHA
R2 BY ADV. SRI.P.KESAVAN NAIR

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 26/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP 13429 OF 1998 IN OP 7742 OF 1998

DISMISSED

26.10.2006 SD/-C.N. RAMACHANDRAN NAIR, JUDGE.

APPENDIX

PETITIONER'S EXHIBIS:

EXT.P1 TRUE COPY OF THE JUDGMENT IN OP NO. 8733 OF 1992 DATED 30.7.1996

EXT.P2 TRUE COPY OF THE ORDER OF THE FIRST RESPONDENT DATED 10.1.1997 SETTING ASIDE ENQUIRY FINDINGS S.A.NO. 17 OF 1990

EXT.P3 TRUE COPY OF THE FINAL ORDER OF THE FIRST RESPONDENT DATED 12.3.1998 ALLOWING THE APPEAL IN S.A. NO. 17 OF 1990.

RESPONDENTS' EXHIBITS: NIL

TRUE COPY

P.S. TO JUDGE.

C.N.RAMACHANDRAN NAIR,J.

O.P.NO. 7742 OF 1998

Dated this the 26th day of October, 2006

JUDGMENT

Petitioner is challenging Ext.P2 order issued by the first respondent declaring the shop appeal filed by the second respondent against his dismissal from service by the petitioner as maintainable and Ext.P3 order declaring the enquiry report based on which second respondent was dismissed by the petitioner as perverse and then allowing the appeal filed by the second respondent against the bank after taking evidence by the first respondent. I have heard counsel appearing for the petitioner and counsel appearing for the second respondent.

2. The second respondent admittedly joined the service of the petitioner-Bank in the year 1970. While in service as Accountant in the petitioner-Bank, petitioner gave second respondent charge as Branch Manager of a branch with additional pay for holding charge as Branch Manager. While working so, a member of the Bank by name Johnson is said to have seen the second respondent in the Bank engaged in

sexual relationship with a lady Sweeper of the Bank at 9.30 A.M. on 14.10.1989. On the basis of the complaint from the said member, second respondent was placed under suspension on 10.11.1989. A lawyer who was junior to the legal adviser of the petitioner-Bank was appointed as Enquiry Officer. In the enquiry it is admitted that lady Sweeper with whom the second respondent is alleged to have had sex was not examined on the side of the Bank. The Enquiry Officer whose report is not filed in Court conducted enquiry and held the second respondent guilty of the charges levelled against him, which were allegation of sexual relationship the second respondent had with the Sweeper lady by name Aeli at 9.30 A.M. on 14.10.2989 and the consequent disrepute to the Bank among the public and those who are dealing with the Bank and the loss of trust and reputation to the Bank among the staff, and public which affected it's future performance. Based on the enquiry, petitioner dismissed the second respondent from service on 2.7.1990. Dismissal order was issued not by the Sub Committee of the Bank but by the Board of Directors of the Bank which forfeited the right of appeal to second respondent to the Board of

Directors of the Bank. Second respondent therefore filed shop appeal against the dismissal order under Section 18(2) of the Kerala Shops and Commercial Establishments Act 1960, hereinafter called the "Act". Petitioner questioned the maintainability of the appeal first, which was decided against it vide Ext.P2. Even though validity of this order was questioned before this Court, this Court did not decide the matter on merits but dismissed the O.P. leaving open the petitioner's right to challenge the matter. In fact, in the course of final disposal of shop appeal, the first respondent has overruled petitioner's objection in Ext.P3 order which is contested in this O.P. Besides maintainability petitioner is contesting the decision in appeal on merits also rendered by the first respondent in Ext.P3.

3. As already stated, the only allegation against the second respondent is that he was engaged in sex with Sweeper lady Aeli at 9.30 A.M. inside the Bank on 14.10.2989. The enquiry conducted by the Enquiry Officer was found to be perverse by the first respondent and the Bank is not questioning this part of the award by producing enquiry report and substantiting the findings therein. In fact, it was

thoroughly wrong on the part of the Bank to have engaged a Junior of the Legal Adviser of the Bank as an Enquiry Officer. In any case, since correctness of the enquiry report is not canvassed in this Court, there is no need for this Court to decide the same. Therefore this Court has to only consider whether the other contentions are tenable. In the first place, counsel for the petitioner contended that second respondent was not an employee as he was holding charge as the Branch Manager at the time of incident and so much so, shop appeal under Section 18(2) of the Act is not maintainable. Section 3(1) of the Act excludes the operation of the Act in respect of persons employed in any establishment "in a position of management". While the case of the petitioner is that second respondent was the Branch Manager, the finding in Ext.P3 order based on evidence furnished by the Secretary of the Bank is that second respondent at the relevant time was an Accountant and was holding additional charge as Branch Manager, for which he was paid an allowance. Whether a person is holding a position in management has to be considered with reference to the responsibilities assigned to him and the duty entrusted to him. The

executive officer in charge of the Bank was the Secretary of the Bank, which is a society registered under the Societies Act and the second respondent at the relevant time was only an Accountant. In fact the question whether a person was occupying a position in management is a question of fact which has to be proved by evidence to be let in. Petitioner has not adduced any evidence to show that second respondent was assigned any function as Manager like power to decide the affairs of the institution as it's Manager, or control over employees in regard to disciplinary action or any such managerial function. On the other hand, he was admittedly an Accountant and was paid wages as Accountant at the relevant time. Since there was no Manager in the Bank, he was given charge of the Manager and was given an allowance for the same. I am of the view that a person who is given charge as Manager of a Branch of the Bank for a short time, but at the same time continuing as a regular employee in the status of Accountant cannot be said to be a person in position of management for denying the right conferred on him under the Act. Therefore I uphold the finding of the first respondent that the second respondent was not a person in position

of management and hence shop appeal was rightly found to be maintainable by the first respondent.

4. The next question to be considered is whether the appellate authority's finding that there was no material to hold that second respondent was guilty of the charge levelled against him is correct or not. As already held, the finding of the appellate authority that enquiry report was perverse and was not reliable was not contested by the petitioner. Therefore the first respondent rightly allowed the petitioner to adduce evidence to substantiate their case. The only witness who gave evidence is the very same member of the Bank by name Johnson, who is said to have seen the second respondent engaged in sex with the Sweeper lady in the Bank. According to him, second respondent was engaged in sex without locking the door, and the member on opening the door saw the second respondent standing on his knees with the dress of the woman lifted up. Even though he concedes that Sweeper lady is living 2 KMs. away from his house and is personally known to him for a long time, he could not identify the lady, even though he claims to have seen the second respondent engaged in sex with the said

lady. Admittedly he is said to have identified the woman with whom second respondent had sex in the Bank as the Sweeper lady of the Bank after three days of the date of occurrence witnessed by him. An attender of the Bank who initially gave evidence in favour of the petitioner-Bank later was examined as a witness for the second respondent and he denied the occurrence, but stated that the first statement was given by him at the request of one of the erstwhile directors of the Bank on a promise of his confirmation in service. The member of the Bank who claims to have seen the incident claims that he came to the Bank to make enquiry about a loan. However, he could not answer the questions asked in cross-examination pertaining to the loan. In other words, the purpose of his visit to the Bank does not stand proved. In these circumstances, the first respondent exonerated the second respondent from the charges and he therefore granted consequential relief. I do not find any ground to interfere with the finding of the first respondent because the allegation is of a serious nature. Unless clinching evidence is available, second respondent cannot be held guilty of the charges. Strengely the woman involved

who was employed as a Sweeper on the date of occurrence in the Bank was not examined. Since she has not made a complaint to the Bank, obviously she should be taken to be a consenting party to the occurrence, if it has happened. The Bank however does not appear to have taken any action against her as she was also involved in the act of engaging in sex in the Bank's office which is certainly an objectionable matter amounting to gross indiscipline on which the Bank should have taken disciplinary action against both the employees involved. However, there is nothing on record and even in this Court counsel for the Bank has not explained what happened to the lady. Above all, it is very difficult to believe, and against normal human conduct, that a person would involve in sex with another employee during office hours in the Bank where another employee was also present without even locking the door. Therefore certainly second respondent is entitled to the benefit of doubt. In the circumstances, I uphold the order of the first respondent in completely exonerating the second respondent of the charges levelled against him.

5. The next question to be considered is the challenge against the

relief granted which is in the form of reinstatement with full backwages with continuity of service or in the alternative compensation of Rs. 8 lakhs. In order to appreciate the nature of loss suffered by the second respondent, this Court directed the parties to calculate the loss of wages had the second respondent continued in service. Second respondent's counsel produced a statement which shows that he would have drawn an amount of Rs. 18,63,316/- towards arrears of wages including DA and HRA alone. Further benefits computed amount to Rs. 1,77,176/-. Counsel for the petitioner-Bank submits that the working out of benefits produced in Court is approximately correct, thought not precisely, and according to him, the total benefit would be a little over Rs. 15 lakhs. In the circumstnces, the compensation of Rs. 8 lakhs awarded under Section 18(3) of the Act cannot be said to be excessive or arbitrary. During the pendency of OP petitioner enjoyed virtually full stay because this Court ordered payment of paltry sum of Rs. 10,000/- to the second respondent as a condition for granting stay. I feel second respondent should be compensated for six years' delay in recovery of the compensation awarded by the first respondent, which

stands confirmed by this judgment. In the circumstances, I direct the petitioner to pay Rs. 50,000/- towards interest along with the compensation amount, which should be paid within one month from the date of production of a copy of this judgment by the second respondent.

O.P. is dismissed, but with the above directions.

(C.N.RAMACHANDRAN NAIR)
Judge